NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

T. S. SUTTLES, as Tax Collector of Fulton County, Georgia, W. OSMER DAVIS, Sheriff, Fulton County, and JOHN C. TOWNES, as Chairman of the Board of Tax Assessors of Fulton County, Georgia,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND SUPPORTING BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 653

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

T. E. SUTTLES, AS TAX COLLECTOR OF FULTON COUNTY, GEORGIA, W. COMER DAVIS, REESE PERRY AND JOHN C. TOWNLEY, AS MEMBERS OF THE BOARD OF TAX ASSESSORS OF FULTON COUNTY, GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND SUPPORTING BRIEF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Northwestern Mutual Life Insurance Company, respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Georgia to review a final judgment of that court entered the 27th day of July, 1946. A certified transcript of the record in the case, including the proceedings in the Supreme Court of the

State of Georgia, accompanies this petition, in accordance with the rules of this Court.

I

Summary and Short Statement of Matter Involved

This petition involves the questions of whether the Supreme Court of Georgia has deprived petitioner of its rights under the due process and equal protection clauses of the Federal Constitution in holding (1) that certain credits secured by real estate in Fulton County, Georgia, had acquired a business situs in that County so as to be subject to *ad valorem* taxation therein, and (2) that petitioner had not been the victim of an intentional and systematic discrimination by officials of Fulton County, Georgia, in the assessment of said credits for *ad valorem* taxation.

The questions arose in a petition in equity filed by petitioner, Northwestern Mutual Life Insurance Company, in the Superior Court of Fulton County, Georgia, against T. E. Suttles, as Tax Collector, and Comer Davis, et al, as the Board of Tax Assessors of Fulton County, Georgia (R. 27). Petitioner sought to enjoin the collection of *ad valorem* taxes on certain mortgage credits owned by petitioner, a non-resident corporation, for the years 1931 to 1937 inclusive, on the ground that such credits had not acquired a situs for taxation in Fulton County, Georgia, and the collection of *ad valorem* taxes thereon would deprive petitioner of its property, contrary to the due process and equal protection clauses of the Constitution of the United States and of the Constitution of the State of Georgia. The defendants in their answer claimed the credits arose out of a loan business conducted in Fulton County, Georgia, and by reason thereof had acquired a local business situs so as to make such credits taxable (R. 41).

On the first trial of the case in the lower court, a decree was entered in favor of petitioner. On appeal, the Supreme Court of Georgia reversed the lower court and ordered a new trial, holding the evidence established that the credits were a part of a local loan business conducted in Fulton County, Georgia (R. 2-27).

In advance of the second trial of the case, petitioner by a series of amendments alleged that the defendants in making the assessments in question had been guilty of a systematic and intentional discrimination against petitioner, in violation of the equal protection and due process clauses of the Federal and State Constitutions (R. 54, 86, 102, 107) for that assessments were made against petitioner but not against the majority of owners of intangible personal property, and, in addition, petitioner was assessed at 30% of value for seven years, while others were assessed at 25% for only three years.

On the second trial, a verdict was directed by the lower court against petitioner and in favor of defendants on the issue of discrimination as well as taxability. On appeal by petitioner, the Supreme Court of Georgia affirmed the lower court (R. 269, 295, 304, 317, 324) and subsequently denied three motions for rehearing. On the issue of taxability, the Georgia Supreme Court held the evidence was substantially the same at the second trial as at the first, and it would adhere to its decision on the first appeal. On the issue of discrimination, the court held the evidence was insufficient to permit the question to go to a jury.

On the issue of taxability, the facts are not in dispute. Petitioner is a corporation of the State of Wisconsin, with its principal office in Milwaukee, Wisconsin, where it has for many years engaged in business as a mutual life insurance company. In maintaining its reserve against insurance contracts issued, petitioner has lent money on

the security of real estate. These loans have been made as follows:

Functions Performed in Milwaukee

The sole right to determine whether or not an application for a loan would be accepted or rejected and the terms on which a loan would be made, was vested in and performed by a Finance Committee of eight persons at the Company's home office in Milwaukee, Wisconsin. A loan department in Milwaukee, consisting of from 200 to 250 employees, was maintained, which handled the loan business of the Company with the exception of legal matters and the action of the Finance Committee, both of which also occurred in Milwaukee. The Loan Department in Milwaukee appointed and supervised the activities of the agents of the Company in the field, who were solicitors of loans and designated as "loan agents." Upon receipt of an application for a loan, the Department prepared an analysis for the Finance Committee and in some instances, obtained supplemental credit information. It presented the application together with its recommendations to the Finance Committee in Milwaukee, and transmitted the latter's decision to the loan agent in the field for delivery to the applicant. Upon receipt of an abstract of title prepared by applicant's attorney, this was passed on by the Legal Department in Milwaukee, which Department also drew all notes, security deeds, assignment of leases and other papers required, and passed on the sufficiency of their execution by the borrower. The Loan Department kept all notes, security deeds, and other papers in Milwaukee. It kept up with all maturities, sent out notices, and made all collections. It kept up with taxes and insurance and sent notices to the borrower. All funds available for lending were kept in Milwaukee and were disbursed by check to the borrowers.

Functions Performed in Fulton County, Georgia

The loan-soliciting agent of the Company in Georgia since 1900 was E. M. Durant, designated as "loan agent". He maintained an office in Fulton County, Georgia, on which he paid rent but for which he was reimbursed by the Company. He solicited written applications for loans to be made by the Company, and in 1931 there were 19 loans on property in Fulton County, Georgia, still outstanding, all made before 1928. Durant had solicited no new applications since 1928. Prior to 1928, it had been his practice to obtain written applications for loans on forms addressed to the Finance Committee which he would transmit to Milwaukee along with his opinion as to the moral character of the applicant and the value of the proffered security. He had no authority to make any loans at any time, but such power was vested solely in the Finance Committee in Milwaukee, whose decision was usually sent to him and he in turn advised the applicant. If favorable, he obtained from applicant an abstract of title prepared by applicant's attorneys and sent it to Milwaukee. The loan papers were prepared in Milwaukee and sent to him and he arranged for their execution. After execution, he returned them to Milwaukee, and if satisfactory to the Loan Department, the check payable to borrower and the security deed were sent to him. He delivered the check, had the security deed recorded and then returned it to Milwaukee. Loan renewals were handled in a similar manner. He would receive insurance policies if he knew the insuring companies were acceptable to the Loan Department. At one time, maturity notices were sent direct to the borrower. At another time, these notices were sent to Mr. Durant for transmission to the borrower. He did not handle the collection of interest or principal on

the loans, but if a borrower's check were sent to him, he merely forwarded it to Milwaukee. When a loan became in default, the Loan Department in Milwaukee would usually ask him to contact the borrower to see if the default could not be cured. Durant had no money to lend on behalf of the Company. He made no decisions as to the acceptance or rejection of loans. His functions were purely ministerial and involved no element of judgment or management, and consisted mostly in getting the borrower to do what he had already agreed to do.

In 1933 Durant took over the management of the Arcade Building in Fulton County, on which the Company held a loan, belonging to the Flynn Realty Company, and was subsequently appointed Receiver. This property was later returned to the owners.

During the period in question, the Company had no other agents than Durant in Fulton County, Georgia, who had any connection with the solicitation of applications for loans in Fulton County, Georgia, or with the making of loans to residents of Fulton County, Georgia.

It was established by the evidence that, as a general practice, companies engaged in lending money from a central office to borrowers over a wide territory handled the solicitation of applications for loans, which were to be submitted to the Home Office, to be there accepted or declined, by one of three methods, (1) brokers or borrowers submitted applications, (2) the lending company appointed correspondents who were independent agents and who solicited and submitted applications, and (3) the lending company employed salaried agents to solicit and submit applications. The actual functions performed in each case were approximately the same. Your petitioner employed the third method.

On the issue of discrimination, the Supreme Court of Georgia affirmed the lower court's direction of a verdict

against petitioner on the ground that there was insufficient evidence in support of the alleged discrimination to let the matter be passed on by the jury. The evidence showed:

During the period in question, 1931-37, all property including intangibles was required by Georgia law to be assessed for *ad valorem* taxation at 100% of its value. As a result, few owners of intangibles returned such intangibles for taxation and only a small percentage of such property was ever assessed. In 1935, a drive was made by the taxing authorities of Fulton County, Georgia, and other public-minded groups to get such intangibles returned for taxation. The tax authorities agreed to accept such property on the basis of cash 5%, stocks and bonds 15%, and mortgages 25%, and to forgive all taxes, interest and penalties for the seven prior years (the period of the statute of limitations). Some owners of intangibles took advantage of this offer, but the great majority did not.

On December 27, 1937, the Georgia Intangible Tax Act was enacted (Ga. Laws, 1937-38 Ex. Sess. p. 156, Ga. Ann. Code § 92-114, et seq.) to provide a new method of taxing intangibles on an *ad valorem* basis. It provided that persons making returns under the Act in 1938 would not be required to pay any *ad valorem* taxes on intangibles for prior years,

> ". . . on which no return or assessment has been made or on which no litigation has been instituted either by the taxing authorities or the taxpayer prior to January 1, 1938."

The provision just quoted was construed by the defendants, the taxing authorities of Fulton County, Georgia, as giving them the right to make any assessments they saw fit between December 27, 1937 and January 1, 1938, and that such assessments would be excepted from the short statute of limitations contained in the statute. They selected a

small number of owners of mortgage credits, 51 in number and mostly non-residents, and a small number of owners of stocks and bonds, 63 in number, against whom assessments were made, but they ignored both then and in the subsequent years the vast majority of the holders of intangibles who had not paid any *ad valorem* taxes on their intangibles.

Under the new Intangible Tax Act, owners of intangibles began making returns and the number of taxpayers making such returns and the amount of intangibles returned increased tremendously.

One of the defendants, W. Comer Davis, testified that the assessors felt they had covered the intangible picture and had "scraped the barrel" in an effort to collect intangible taxes, yet the evidence showed no effort to make assessments against other holders of intangibles who had not returned the same for the period 1931-37, even though the names of a large number of holders of intangibles became available under the Intangible Tax Act.

There was no dispute in the evidence that petitioner had been assessed at 30% of value for seven years, while others had been assessed at 25% for only three years.

II

Jurisdiction of This Court

The basis of this Court's jurisdiction is Section 237(b) of the Judicial Code (28 U.S.C.A. §344(b)). The judgment of the Supreme Court of Georgia sought to be reviewed was entered finally on July 27, 1946, when petitioner's third motion for a rehearing was denied (R. 324); and this petition is filed within three months from the date of that judgment.

The question involved is substantial because the amount of taxes, interest and penalties which petitioner would be required to pay if the assessments in question are upheld is

approximately $287,000.00 The assessments represent a departure from the policy of the taxing authorities of Fulton County, Georgia, in that at no time in the 37 years prior thereto had the attempt been made to subject to *ad valorem* taxation mortgage credits owned by non-resident insurance companies where the money had been loaned from the home office of such companies on the security of property located in Fulton County, Georgia. The assessments represent an attempt to hold petitioner liable for *ad valorem* taxes, not only for the year 1937, in which the assessments were made, but for six years prior thereto.

The question is not only of importance to petitioner, but to other non-resident owners of mortgage credits secured by real estate in Fulton County, Georgia, for the period in question and for the years subsequent thereto, who are involved in litigation with the taxing authorities of Fulton County contesting the validity of similar assessments. A ruling by this Court in this case would not only decide the constitutional questions here presented, but would likewise contribute substantially toward the decision of such questions involved in the other cases now pending. Jurisdiction of this Court to review the federal questions decided by the Supreme Court of Georgia is sustained by the following cases:

As to taxability:

Union Refrigerator Transit Co. v. *Ky.*, 199 U. S. 194;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83;
Buck v. *Beach*, 206 U. S. 392;
Frick v. *Pennsylvania*, 268 U. S. 473;
Wheeling Steel Corp. v. *Fox*, 298 U. S. 193.

As to discrimination:

Cumberland Coal Co. v. *Board*, 284 U. S. 23;
Iowa-Des Moines Nat. Bank v. *Bennett*, 284 U. S. 239;
Sioux City Bridge Co. v. *Dakota County, Nebraska*, 260 U. S. 441;

Township of Hillsborough v. *Doris Duke Cromwell* (Jan. 28, 1946), 326 U. S. 620.

How and When the Federal Question Was Raised

The federal question as to taxability was raised in petitioner's complaint (R. 27). It was urged at the first trial and decided by the lower court in favor of petitioner. It was argued before the Supreme Court of Georgia on the first appeal and decided by that court adversely to petitioner's contentions (R. 2-27). It was urged at the second trial and decided by the lower court adversely to petitioner's contentions. It was urged before the Supreme Court of Georgia on the second appeal and that court considered this federal question and decided it adversely to petitioner's contention (R. 269-294). It was urged in the several motions for rehearing filed by petitioner (R. 295, 304, 317) which motions were overruled.

The federal question as to discrimination was raised in amendments to petitioner's complaint (R. 54, 86, 102, 107). It was urged at the second trial and decided by the lower court adversely to petitioner's contentions. It was urged before the Supreme Court of Georgia on the second appeal and that court considered this federal question and decided it adversely to petitioner's contention (R. 269-294). It was urged in the several motions for rehearing filed by petitioner (R. 295, 304, 317) which motions were overruled.

III

The Questions Presented

1. Does the decision and judgment of the Georgia Supreme Court holding that certain credits secured by real estate in Fulton County, Georgia, and owned by petitioner, a non-resident corporation, had acquired a business *situs*

in that county so as to be subject to *ad valorem* taxation therein, deprive petitioner of its rights under the due-process and equal protection of the law clauses of Section 1 of the Fourteenth Amendment to the Federal Constitution?

2. Does the decision and judgment of the Georgia Supreme Court holding that the taxing officials of Fulton County, Georgia, in the assessments against petitioner of credits secured by real estate in Fulton County, Georgia had not been guilty of an intentional and systematic discrimination against petitioner, deprive petitioner of its rights under the due process and equal protection of the law clauses of Section 1 of the Fourteenth Amendment to the Federal Constitution?

IV

Reasons Relied On for the Allowance of the Writ

1. The Georgia Supreme Court in violation of the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the Federal Constitution, has (a) found that the credits secured by real estate in Fulton County, Georgia, and owned by petitioner, a non-resident of Georgia, had a taxable *situs* in Georgia because they arose out of and were integrated with a business of lending money conducted by petitioner in Fulton County, and (b) found that there had been no intentional and systematic discrimination against petitioner in the making of the assessments in question.

2. The undisputed evidence shows that petitioner's mortgage credits had no taxable situs in Fulton County, Georgia, and there is no basis in law or in fact for the holding of the Georgia Supreme Court to the contrary. The mortgage credits arose out of the business of lending money conducted in Milwaukee, Wisconsin, where all responsibility, authority

and management were exercised. There had been no localization of any money-lending business in Georgia, and the activities of the employee Durant in Georgia either prior to or during the period in question, 1931-1937, were insufficient to constitute the carrying on of a lending business in Fulton County, as such activities consisted only of transmitting applications for loans or applications for renewals and papers in connection therewith and taking such steps to protect the security and ultimate collection of the loans as the Milwaukee office directed.

3. The decision of the Georgia Supreme Court on the taxability of the mortgage credits in question is in conflict with its own decisions in

Suttles v. *Associated Mortgage Companies,* 193 Ga. 78, 17 S. E. (2) 272;

National Mortgage Corporation v. *Suttles,* 194 Ga. 768, 22 S. E. (2) 386;

Davis v. *Metropolitan Life Ins. Co.,* 196 Ga. 304, 26 S. E. (2) 618;

wherein the Georgia Supreme Court held that a non-resident owner of credits secured by real estate in Georgia was not taxable in Georgia thereon because of the use of brokers or loan agents to solicit and transmit written applications for loans to non-resident, inspect properties or deliver checks or because of the maintenance of an office or agents in Georgia to protect the collection or liquidation of the loans, these being precisely the same functions performed by petitioner's agent in Fulton County, Georgia.

4. The assessment of petitioner on its mortgage credits and the failure to assess the great majority of the owners of intangible property located in Fulton County, Georgia, and also the assessment of petitioner at 30% of value for

each of seven years, while others were assessed at 25% for only three years, was the result of an intentional and systematic discrimination against petitioner.

5. The Georgia Supreme Court has decided federal questions in a way probably not in accord with applicable decisions of this Court. The effect of the Georgia court's decisions in this case is that the mere maintenance of a salaried employee in a State, with no control over the lending of money and no authority to lend money, is sufficient to impose a taxable *situs* on intangibles notwithstanding the fact that such intangibles arose out of business actually conducted at the home office in another State. Some of the decisions of this Court with which the above holding is in conflict are:

Union Refrigerator Transit Co. v. *Ky.*, 199 U. S. 194;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83;
Buck v. *Beach*, 206 U. S. 392;
Frick v. *Pennsylvania*, 268 U. S. 473;
Wheeling Steel Corp. v. *Fox*, 298 U. S. 193.

The effect of the decision of the Georgia Supreme Court as to discrimination is to permit one taxpayer to be treated differently from another taxpayer, merely because one of the taxing officials, contrary to the testimony of his predecessor, said that the taxing authorities had really meant to treat all alike. That ruling appears to be in conflict with the following decisions of this Court:

Cumberland Coal Co. v. *Board*, 284 U. S. 23;
Iowa-Des Moines Nat. Bank v. *Bennett*, 284 U. S. 239;
Sioux City Bridge Co. v. *Dakota County, Nebraska*, 260 U. S. 441.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court, directed to

the Supreme Court of the State of Georgia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Georgia had in the case numbered and entitled on its docket, No. 15427, *Northwestern Mutual Life Insurance Company, Appellant,* v. *T. E. Suttles, as Tax Collector of Fulton County, Georgia, W. Comer Davis, Reese Perry and John C. Townley, as members of the Board of Tax Assessors of Fulton County, Georgia, Appellees;* and a full and complete transcript of the record and of the proceedings of the said Supreme Court of Georgia had on the first appeal of the controversy between the parties in case numbered 13904, entitled on its docket *T. E. Suttles, as Tax Collector of Fulton County, C. H. Gullatt, Reese Perry and Comer Davis, Appellants,* v. *Northwestern Mutual Life Insurance Company, Appellee,* to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States and that the judgment of said Supreme Court of Georgia be reversed, and for such other relief as to this Court may seem proper.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of Georgia is reported in 38 S. E. (2d) 786, and appears in the Record at pages 269-294. The opinion of the Supreme Court of Georgia on the first appeal in this case is reported in 193 Ga. 495, 19 S. E. (2d) 396, 21 S. E. (2d) 695, 143 A. L. R. 343, and is set out in the Record at pages 2-26.

Jurisdiction

A full statement of the grounds on which it is claimed that this Court has jurisdiction is contained in Section II of the petition for writ of certiorari, and the same is hereby adopted and made a part of this brief.

Statement of the Case

The facts in this case are set out in Section I of the petition for writ of certiorari, and the statement there made is hereby adopted and made a part of this brief.

Specifications of Errors

The Supreme Court of Georgia erred in holding that the mortgage credits owned by petitioner and secured by real estate in Fulton County, Georgia had acquired a business *situs* in that County so as to be subject to *ad valorem* taxation therein, and in holding that the evidence failed to establish an intentional and systematic discrimination against petitioner by officials of Fulton County, Georgia, in the assessment of said credits for *ad valorem* taxation. In its decision the Supreme Court of Georgia has deprived petitioner of its rights under the due process and equal

protection clauses of Section 1 of the Fourteenth Amendment to the Federal Constitution.

Summary of Argument

A synopsis of the argument is set forth in the index and for the sake of brevity is omitted here.

Argument

As to Taxability

The applicable principles of law are well settled by decisions of this Court. These principles have likewise been announced and followed by the Supreme Court of Georgia in a number of decisions. While the Georgia Supreme Court has set forth these principles in its opinion in this case, it has failed to apply them to the undisputed facts. An outline of the applicable principles follows:

A State may not impose an *ad valorem* tax on property not within its borders. Any attempt to do so would be in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution (and of Article I, §1, ¶3 of the Georgia Constitution).

Intangible property, including mortgage credits, has a taxable *situs* only at the domicile of the owner, unless such intangibles are a part of a business conducted by the owner in a State other than his domicile, in which case the intangibles are said to have acquired a business *situs* away from the owner's domicile and in the jurisdiction where the business is conducted.

For intangibles to acquire a business situs away from the owner's domicile they must be integrated with, or a substantial part of, a local business. They must have arisen out of such a local business or have been detached

from the business conducted at the domicile and made a part of the local business.

In determining whether intangibles have acquired a business *situs* away from the owner's domicile, it is essential that they be used in an established business and be under the managment of an agent with authority and control over such intangibles. The mere presence of an employee in the taxing jurisdiction is insufficient to authorize the taxing of intangibles unless such employee manages a local business of which such intangibles are an integral part. The test is whether or not the non-resident occupies the corresponding situation to that of a resident. The intangibles must be part of a business which has been localized in a jurisdiction other than that of the owner.

The above principles have been announced in many decisions of this Court, including the following:

New Orleans v. *Stempel*, 175 U. S. 309;
Bristol v. *Washington County*, 177 U. S. 133;
Liverpool & London & Globe Ins. Co. v. *Board of Assessors*, 221 U. S. 346;
Assessors v. *Comptoir National*, 191 U. S. 388;
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S. 395;
Farmers Loan & Trust Co. v. *Minn.*, 280 U. S. 204;
Wheeling Steel Corpn. v. *Fox*, 298 U. S. 193;
First Bank Stock Corpn. v. *Minn.*, 301 U. S. 234, 238;
Newark Fire Insurance Co. v. *State Board*, 307 U. S. 313, 319;
Curry v. *McCanless*, 307 U. S. 357, text 368, 381.

An excellent summary of these principles is contained in the *Wheeling Steel Corporation* case, *supra.*

These principles have likewise been announced many times by the Georgia Supreme Court. Some of these cases are:

Collins v. *Miller*, 43 Ga. 336;
Carhart v. *Paramore*, 44 Ga. 262;
Cary v. *Edmondson*, 44 Ga. 651;
Armour Packing Co. v. *Savannah*, 115 Ga. 140, 41 S. E. 237;
Armour Packing Co. v. *Augusta*, 118 Ga. 552, 45 S. E. 424;
Armour Packing Co. v. *Clark*, 124 Ga. 369, 52 S. E. 145;
Columbus Mutual Life Ins. Co. v. *Gullatt*, 189 Ga. 747, 8 S. E. 2d 72;
Suttles v. *Associated Mtg. Cos.*, 193 Ga. 78, 17 S. E. 2d 272;
National Mortgage Corpn. v. *Suttles*, 194 Ga. 768, 22 S. E. 2d 386;
Davis v. *Metropolitan Life Ins. Co.*, 196 Ga. 304, 26 S. E. 2d 618;
Davis v. *Penn Mutual Life Ins. Co.*, 198 Ga. 550, 551. 32 S. E. 2d 180,

and particularly in the first opinion in the instant case, 193 Gl. 495, 19 S. E. 2d 396, 21 S. E. 2d 695 (R. 2-26).

This Court in the *Wheeling Steel Corporation* case, *supra*, after referring to developments with reference to the taxation of tangible property so that it is now taxable in the place where it is kept and used, said:

> "There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a State different from that of his domicile . . . These cases, we said in Farmers Loan & T. Co. *v.* Minnesota, supra (280 U. S. p. 213, 74 L. ed.

375, 50 S. Ct. 98, 65 A. L. R. 1000), 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.' We adverted to this reservation in Beidler *v.* South Carolina Tax Commission, supra (282 U. S. p. 8, 75 L. ed. 133, 51 S. Ct. 54), and in First Nat. Bank *v.* Maine, supra (284 U. S. p. 331, 76 L. ed. 321, 52 S. Ct. 174, 77 A. L. R. 1401)."

The Georgia Supreme Court in the recent case of *Davis* v. *Penn Mutual Life Insurance Company, supra,* held in headnotes 1 and 2 as follows:

"1. The determining factor in the taxability of intangibles, as of tangibles, is territorial jurisdiction of the taxing sovereignty. The want of power to tax property outside the territorial jurisdiction is an inherent limitation on the power to tax. This State, having no external sovereignty under our Federal system, cannot exercise jurisdiction or authority over persons or property without its territory, and 'cannot tax where it has jurisdiction over neither the owner nor the property.' To do so would violate the due-process clause of our State constitution.

"2. 'According to previous decisions by this court construing Georgia statutes, a promissory note executed by a resident of this State, but owned by a non-resident and held by him at his domicile out of this State, is to be taxed here only if it is derived from or is used as an incident of property owned or of a business conducted by the non-resident or his agent in Georgia; and this is true although the note may be secured by a mortgage on land situated in this State.' "

The rule that intangibles arising out of the relationship of debtor and creditor are subject to an *ad valorem* tax is based upon the substantial fact that the property in the debt is in the creditor. The debtor has no property in his debt. As to him, it is a liability and not an asset and in

consequence the existence of the debt cannot support a tax based on the value thereof to him.

Before intangibles can be said to have become localized or associated with a local business in a jurisdiction different from that of the domicile of the owner, it is essential that they arise from the conduct of a local business or be employed in the conduct of such local business by the non-resident owner.

The rule is of universal application that the same factual situation must exist as to the business conducted by a non-resident as exists when a similar business is conducted by a resident to localize the tax *situs* of the intangibles arising therefrom or employed therein by the non-resident.

Wheeler v. *Sohmer, Comptroller of State of New York,* 233 U. S. 434.

State of Iowa v. *Slimmer, et al.,* 248 U. S. 115, 120;

DeGanay v. *Lederer, Collector of Internal Revenue,* 250 U. S. 376;

Shaffer v. *Carter, State Auditor, et al.,* 252 U. S. 37;

Safe Deposit & Trust Co. v. *Virginia,* 280 U. S. 83;

Farmers Loan & Trust Co. v. *Minnesota,* 280 U. S. 204;

Baldwin, et al. v. *Missouri,* 281 U. S. 586;

Beidler, et al. v. *South Carolina Tax Commission,* 282 U. S. 1;

Nickey, et al. v. *Mississippi,* 292 U. S. 393;

Senior v. *Braden,* 295 U. S. 422, 423;

Manufacturers Trust Co. v. *Hackett,* 170 Atl. 792 (Conn.);

Jamison v. *Commonwealth,* 90 S. E. 640 (Va.);

Tax Commissioner v. *Kelly-Springfield Tire Co.,* 175 N. E. 700 (Ohio);

W. W. Kimball Co. v. *Board of Commissioners,* 161 Pac. 644 (Kan.);

Westinghouse Elec. & Mfg. Co. v. *Los Angeles Co.*, 205 Pac. 1076 (Calif.).

In the *Kelly-Springfield* case, *supra*, the court holds as follows:

> "Considering the particular facts of the present case, we conclude that the agency maintained in Cuyahoga County by the Kelly-Springfield Tire Company is not an independent business, nor an independent branch of the principal business of said company, and while it is true that the local sales agency is doing business on a fairly large scale, it is doing so through the immediate control and management of the company's home office. The Kelly-Springfield Tire Company is conducting this branch of its business through the local agency upon its general corporate capital for the general business of its central factory, and the credits sought to be taxed were at all times part of its general corporate assets."

In the case of

Kimball v. *Board of Commissioners*, 161 Pac. 644 (Kan.).

the court says:

> "That to establish an independent business *situs* generally, the element of the separation from the domicile of the owner and fairly permanent attachment to some foreign locality should appear, together with some business use of them or power of managing, controlling, or dealing with them in a business way."

In the case of

Manufacturers Trust Co. v. *Hackett*, 170 Atl. 792 (Conn.);

the court says:

> "The property or right must be localized in some independent business so that its substantial use and

value primarily attach to and become an asset of a business outside of the state of the owner's domicile and constitute, as it were, the subject-matter or stock in trade of that business."

Again quoting from the *Kelly-Springfield* case, *supra:*

"It is clear from the record in this case that there was no vesting of control and management of these credits in the local agency of the Kelly-Springfield Tire Company, and we hold that under the decisions such is necessary to the creation of a business *situs* for the purpose of taxing credits in the state where the debts arose."

The case further says:

"If we may venture to formulate a general statement of this modification of the rule (situs at domicile of owner), it would be that this can only result where the possession and control of the property right has been localized in some independent business or investment away from the owner's domicile, so that its substantial use and value primarily attach to and become an asset of an outside business. In other words, while the non-resident may own the business, the business controls and utilizes in its own operation and maintenance the credits and income thereof."

In *State of Missouri, ex rel. American Automobile Insurance Co.* v. *Gehner, City Assessor, etc., et al.*, 8 S. W. 2d 1057 (Mo.), 59 A. L. R. 1026, the court emphasizes the necessity of local management of the business, saying:

"So as to make debts and credits taxable in a state other than that of the domicile of the owner, they must be used in an established business, and the proceeds of that business must be under a management in such locality, with discretion in the manager as to its proceeds. Otherwise, the *situs* of such credits and debts for the purpose of taxation is the domicile of the owner."

An examination of the cases establishes that before intangibles can be held to have acquired a taxable *situs* away from the domicile of the owner, they must arise out of, or be a substantial part of, a local business conducted elsewhere, and such local business must be under the authority and control of a local manager or management so that in truth and in fact the non-resident in the jurisdiction in question is conducting a business and using therein the intangibles in question. The trend of the cases on this point is summed up in the annotation in 143 A. L. R. 361, at page 368, by the statement that a business *situs* of intangibles for the purpose of taxation in a state other than the domicile of the owner is recognized

> "only where the credits of a nonresident owner are in the possession and control of a more or less independent local agent who holds them for the purpose of transacting a permanent business and of investing and reinvesting the proceeds from the principal or interest in such a manner that the property comes in competition with the capital of the citizens of the state in which the agent resides."

Following the above statement the annotator sets forth a number of cases, including the first decision of the Georgia Supreme Court in the instant case.

The undisputed facts established in the evidence in this case fail to bring it within the exception to the general rule that intangibles are taxable at the domicile of the owner. The only activities of petitioner in Fulton County, Georgia, or in the State of Georgia were those of E. M. Durant. Mr. Durant's activities were as follows:

1. *Solicitation of applications for loans.* This activity was confined to 1928 and prior years, and did not occur during the period for which the assessments were made.

In 1931 there were only 19 outstanding loans on property in Fulton County.

2. *Serving as a channel for the transmission of papers between the Loan Department in Milwaukee and the applicants or borrowers in Fulton County, Georgia.* The papers transmitted to Milwaukee included applications for loans, abstracts of title furnished by attorneys for applicants, applications for renewals of loans, executed loan papers, and insurance policies. The papers transmitted to applicants or borrowers included the decision of the Finance Committee in Milwaukee as to the making of the loan and the terms thereof, the loan papers to be executed, checks covering loans, and in some cases, notices of maturity.

3. *Submitting his opinion as to the moral character of the applicant and the value of the proffered security.* This information was desired by the Home Office in Milwaukee in reaching a decision as to whether the loan should be made, but the Home Office frequently obtained information from other sources, such as Dun & Bradstreet and Retail Credit Company.

4. *Contacting borrowers if default occurred in the payment of the loan or taxes on the property, or in providing insurance.*

The functions of Mr. Durant in the loan business of petitioner were primarily those of a broker whose duty it was to bring the borrower and lender together. His duty was not to make loans, and he was without authority to do so.

The Georgia Supreme Court has held in other cases that

(1) where notes and mortgages are owned and held by a non-resident, secured by land in the State of Georgia, the maintenance of an office and agency in this State for the purpose merely of protecting the security and ultimate

collection or liquidation of the indebtedness, the papers themselves being sent into this State only when needed for cancellation, renewal, or foreclosure, would not be using them in this State as an incident of property owned or business conducted in Georgia. *Suttles* v. *Associated Mortgage Companies*, 193 Ga. 78, 17 S. E. 2d 272; *National Mortgage Corpn.* v. *Suttles*, 194 Ga. 768, 22 S. E. 2d 386.

(2) where a non-resident owner of credits secured by property in Georgia secured such credits through the use of intermediaries such as loan agents or brokers, using the latter as channels for the transmission of papers, relying upon their inspection of property and examination of titles, made at the borrower's instance, and forwarding the money through them also at his instance, the lender does not constitute such intermediaries as his agents to make the loan and such activities do not constitute the doing of business by the non-resident in this State. *Davis* v. *Metropolitan Life Ins. Co.*, 196 Ga. 304, 26 S. E. 2d 618.

Every activity of Durant, representing petitioner, has been covered by such decisions and each of these activities has been held to be insufficient to make the owner of the mortgage credits subject to taxation in Georgia. As already pointed out, the primary function of Durant was that of a broker. He was to bring together the applicant for loans in Georgia with the lending department of the Company located in Milwaukee, and his duties of solicitation, transmittal of papers, opinion as to the value of the security and as to renewals of the loan, insurance policies and taxes are all performed by brokers of insurance loans such as are described in *Davis* v. *Metropolitan Life Insurance Company, supra.*

Actually, after 1928 there were no new loans and none was made during the period 1931-7, inclusive. The basic

element necessary to sustain an *ad valorem* tax is the presence, actual or constructive, of the property in the taxing jurisdiction at the time covered by the assessment.

Under the decisions of the Georgia Supreme Court, the mere fact that petitioner maintained an office in Georgia which it used for the purpose of collecting or liquidating the mortgage credits, and in connection with which the papers were sent into the State for cancellation, renewal or foreclosure, would not constitute the doing of business in Georgia so as to make the mortgage credits taxable. These activities cover all the activities of Durant other than those having to do with the applications for a new loan, which took place in 1928 and prior years. Such activities in no sense were sufficient to constitute the business of lending money during the period for which the assessment was made.

It would seem the only fact on which the Georgia Supreme Court has based its decision in this case is that petitioner, instead of obtaining applications for loans through intermediaries, or brokers, whether the latter were agents of the lending company or not, employed a salaried person to perform these functions.

By contrast, these were the functions performed at the Home Office in Milwaukee:

1. The money used in the lending business conducted by petitioner was kept there.

2. The Loan Department at Milwaukee made an analysis of the proposed loan, which it submitted together with the application therefor to the Finance Committee with its recommendation as to the acceptance of the application.

3. The Finance Committee made the final decision as to the making of loans, together with the terms.

4. All papers in connection with loans were prepared and approved in Milwaukee and all legal matters were

passed on there, including the sufficiency of the title as shown by the abstract furnished by applicant's counsel.

5. All collections of principal and interest were made at Milwaukee.

6. All notices were sent from Milwaukee concerning maturity or other matters, and all bookkeeping was done there.

7. All loan papers were kept in Milwaukee.

8. The number of employees in the Loan Department in Milwaukee was 250, as contrasted with one employee in Georgia, who was for a part of the time on a part-time basis and who had no authority to make loans.

It is clear from the evidence that the mortgage credits in question did not arise out of a loan business conducted in Fulton County. There was no agent, representative or employee of petitioner in Fulton County at any time with authority to make loans, or with any money under his control to lend. The only agents of petitioner with authority to make loans on the security of real estate in Fulton County were in Milwaukee. Durant's activities were confined to solicitation of applications and serving as an intermediary for the transmission of papers and certain steps after a loan had been made looking toward the protection of the security, such as the payment of taxes and the maintenance of insurance. These activities were insufficient to constitute the localization in Fulton County of a money-lending business.

The fact that Durant was described by petitioner as a "loan agent" did not result in the localization in Fulton County of any loan business. The title given Durant is of no significance in comparison with the duties actually performed by him. His duties were no different than those of other loan brokers whose duty it was to bring the borrower and the lender together and to assist in the com-

pletion of the loan arrangements, or of agents whose purpose it was to preserve and protect the security and to accomplish the liquidation of the loans.

The holding of the Georgia Supreme Court that under the facts petitioner was engaged in a lending business in Fulton County with which the intangibles in question were integrated, constitutes a clear denial to petitioner of its rights under Section 1 of the Fourteenth Amendment to the Federal Constitution.

As to Discrimination

The equal protection clause of the Fourteenth Amendment protects a taxpayer from state action which singles him out for discriminatory treatment by subjecting him to taxes either not imposed on others of the same class or not imposed to the same degree. The right is the right to equal treatment. The treatment of others in the same class must be intentional and systematic.

Township of Hillsborough v. *Doris Duke Cromwell,* (Jan. 28, 1946), 326 U. S. 620;

Cumberland Coal Co. v. *Board,* 284 U. S. 23;

Iowa-Des Moines Nat. Bank v. *Bennett,* 284 U. S. 239;

Sioux City Bridge Co. v. *Dakota County, Nebraska,* 260 U. S. 441;

Montgomery v. *Suttles,* 191 Ga. 781, 13 S. E. 2d 781;

Phillips Petroleum Co. v. *Townsend,* 63 F. (2d) 293;

16 C.J.S. Constitutional Law, Section 502 (page 988), Section 505 (page 993).

The Georgia Supreme Court in its decision on the second appeal upheld rulings of the lower court on demurrers against petitioner and the direction of a verdict against petitioner on the issue of discrimination, saying that the evdence was insufficient to show any deliberate or intentional plan or purpose of the taxing authorities to assess

some and not assess others, or to assess some for a short period and others for a longer period (R. 269-294).

A directed verdict is proper only if there is no conflict in the evidence or no evidence to sustain the position of the party against whom it is directed.

The evidence offered on behalf of petitioner shows the following unequal treatment by the taxing authorities of Fulton County, Georgia:

1. A great majority of the owners of intangibles subject to taxation in Fulton County, Georgia for the period 1931-1937 was not assessed for *ad valorem* taxation and paid no *ad valorem* taxes. Between December 27, 1937 and January 1, 1938, the taxing officials selected a small number of owners of mortgage credits, 51 in number, including petitioner, and mostly non-residents, and a small number of owners of stocks and bonds, 63 in number, against whom assessments were made for each of the years 1931-1937 inclusive, but no assessments were made at that time or in any subsequent years against the vast majority of the holders of intangibles who had not paid any *ad valorem* taxes on their intangibles for the years in question. This constituted an unequal treatment of petitioner as against the treatment intentionally and systematically given to the great majority of the holders of intangibles. One of the defendants, W. Comer Davis, who during the time of the assessments was Secretary of the Board of Tax Assessors of Fulton County, testified they felt that they had covered the intangible tax picture, but the evidence of the Chairman of the Board of Tax Assessors at that time showed that no efforts were made after January 1, 1938 to make any assessments against owners of intangibles. The reason for this was the passage of the Intangible Tax Act, which contained a provision forgiving all

past-due intangible taxes where a return was made for the year 1938 under the terms of the statute.

2. The taxing authorities, during the period 1931-1937 inclusive, and particularly during the years 1935 and 1936, accepted a small number of returns by owners of intangibles and assessed them on the basis of mortgage credits at 25%, stocks and bonds at 15%, and cash at 5%. In such cases no effort was made to assess these taxpayers for any year prior to 1935 and no effort was made to collect any interest or penalties. The assessment against petitioner on the basis of 30% for each of seven years, together with interest and penalties, constituted unequal treatment. In fact, it represented a four-fold departure by the taxing authorities from the system of assessment in effect in the years 1935-36, to-wit:

(a) The percentage of assessed value was greater, i.e., 30% as against 25%;

(b) The period of time covered by the assessments was greater, i.e., seven years as against the current year;

(c) Interest was imposed on petitioner, whereas no interest was imposed on other taxpayers;

(d) Penalties were imposed on petitioner, whereas no penalties were imposed on other taxpayers.

The Georgia Supreme Court in *Montgomery* v. *Suttles,* 191 Ga. 781, 13 S. E. 2d 781, granted relief to a taxpayer who had been assessed 50% on his stocks and bonds, where it was shown that other holders were assessed only 15%.

There was ample evidence for a submission of the issue of discrimination to the jury and the evidence clearly shows that petitioner received unequal treatment from the taxing officials of Fulton County, and further, that the different treatment of other taxpayers was the result of an intentional and systematic plan.

Conclusion

The decision of the Georgia Supreme Court is of great importance to petitioner. Not only is a large amount of money involved, but by reason of the fact that prior to 1937 no contention was made that the local solicitation of an application for loan to be made by a non-resident, if accepted at the residence of the latter, localized the business of lending money at the residence of the borrower and there fixed the *situs* for *ad valorem* taxation of such loan, *ad valorem* taxes on such credits were not considered in fixing interest rates. If the decision of the Georgia Supreme Court is Correct, then it would follow that the mortgage credits of petitioner secured by real estate in other states has a taxable *situs* in such other states, merely because petitioner utilized the services of salaried employees to submit applications for loans and to handle the transmission of papers.

The decision of the Georgia Supreme Court is of general importance because of similar cases now pending in the Georgia courts in which taxpayers have raised the same constitutional questions, and a decision by this Court on these constitutional questions would be a substantial contribution to the determination of those cases.

It is respectfully submitted, therefore, that petition for certiorari should be granted.

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